

THE HONORABLE ROBERT L. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

v.

MONSANTO COMPANY, SOLUTIA, INC.
and PHARMACIA CORPORATION, and
DOES 1 through 100,

Defendants.

Case No. 2:17-cv-53-RSL

OPPOSITION TO MOTION TO
REMAND

NOTE ON MOTION CALENDAR:
MARCH 10, 2017

OPPOSITION TO MOTION TO REMAND
CASE NO. 2:17-CV-53-RSL

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I. Introduction

This Court has three independent bases for jurisdiction and remand should be denied.

First, this case was properly removed under the broad, liberally-construed federal officer removal statute, 28 U.S.C. § 1442(a)(1). Old Monsanto acted under color of federal officers when manufacturing and supplying PCBs to help the federal government carry out multiple wars. There is a nexus between the State's claims and Old Monsanto's compliance with government demands to provide the military with PCBs at its facilities on the same bodies of water that the State now alleges are contaminated with PCBs. Having supplied PCBs to the military to conduct a war, the government contractor defense and federal preemption preclude imposition of liability on Defendants for that conduct. The State argues these defenses are not meritorious, but to obtain remand, it must show that these federal defenses are not even "colorable," a standard that it does not seriously address and cannot meet.

Second, the State's claims for natural resource damages are thinly-veiled CERCLA claims that can be easily unmasked to confer federal question jurisdiction. "Natural resource damages" actions can only be brought by designated "natural resource damages trustees," such as states, under CERCLA. "Natural resource damages" is a statutory term of art expressly included within CERCLA's thoughtful framework for the cleanup of contaminated sites, and it does not appear in *any* of the state-law statutes pleaded in the State's complaint.

Third, the State's Complaint concerns alleged PCB water contamination from activities on federal enclaves identified by Defendants, for which there is exclusive federal jurisdiction. The State offers no evidence to support its speculation that the allegedly contaminated water bodies on federal enclaves are not the areas "most affected" by PCBs, nor any reason why that speculation, if true, would deprive this Court of jurisdiction to the extent that the State's claims concern federal enclaves.

This lawsuit by the State of Washington is exactly the type of action for which

1 Congress has elected to provide a federal forum, given the federal issues raised regarding
 2 military contracts, CERCLA remediation, and federal lands. Nine other cases alleging
 3 identical conduct are all pending in federal district courts, including the *City of Spokane* case
 4 in the Eastern District of Washington and the *City of Seattle* case, which is before this Court.
 5 In fact, this case, *City of Spokane*, and *City of Seattle* are litigating overlapping claims
 6 regarding the same water bodies (*i.e.*, the Duwamish and Spokane Rivers). The State's
 7 contention that it can file an action raising the same issues and yet escape federal jurisdiction
 8 is without merit. The motion to remand should be denied.

9 II.

10 III. Legal Authorities and Argument

11 A. Defendants' Federal Officer Removal Is Proper

12 The federal officer removal statute is "broad, and the statute must be liberally
 13 construed." *Watson v. Phillip Morris Cos., Inc.*, 551 U.S. 142, 147 (2007). As the Ninth
 14 Circuit has recently held—and the State ignores—"defendants enjoy much broader removal
 15 rights under the federal officer statute than they do under the general removal statute." *Leite*
 16 *v. Crane Co.*, 749 F.3d 1117, 1122 (9th Cir. 2014) (citing *Durham v. Lockheed Martin*
 17 *Corp.*, 445 F.3d 1247, 1253 (9th Cir. 2006)). The State also fails to acknowledge the 2011
 18 amendments to the federal officer removal statute, which were "intended to broaden the
 19 universe of acts that enable Federal officers to remove to Federal court." *In re*
 20 *Commonwealth's Motion to Appoint Counsel*, 790 F.3d 457, 467 (3d Cir. 2015) (citing
 21 legislative history).

22 The Supreme Court and the Ninth Circuit have rejected the argument, advanced by
 23 the State here, that Defendants must prove their federal defense before they have an
 24 opportunity to litigate in the federal forum. A "defendant invoking § 1442(a)(1) 'need not
 25 win his case before he can have it removed.'" *Leite*, 749 F.3d at 1124 (quoting *Willingham*
 26 *v. Morgan*, 395 U.S. 402, 407 (1969)). Rather, Defendants need only establish that the

1 federal defense is “colorable.” *Id.* “In deciding whether a defendant has such a defense,
 2 courts reject a ‘narrow, grudging interpretation;’ they do not require that the defense is likely
 3 to be successful on the merits.” *In re “Agent Orange” Prod. Liab. Litig.*, 304 F. Supp. 2d
 4 442, 449 (E.D.N.Y. 2004) (citing *Jefferson Cnty. v. Acker*, 527 U.S. 423, 431).

5 The minimal burden for removal under the federal officer statute requires Defendants
 6 to show (1) that they are a “person” within the meaning of the statute; (2) that Old
 7 Monsanto’s actions were taken while acting under a federal officer and with a causal nexus
 8 to the State’s claims; and (3) that a colorable federal defense is presented. *Leite*, 749 F.3d at
 9 1120 (quoting *Durham*, 445 F.3d at 1251). The State does not dispute that Defendants are
 10 persons. Only the latter two prongs are contested.

11 **1. Old Monsanto Acted Under Federal Officers When Supplying** 12 **PCBs to Federal Officers, Agencies, and Military Contractors**

13 The authorities affirmatively cited by the State establish that Old Monsanto satisfied
 14 the “acting under” requirement “with respect to the PCBs that Old Monsanto sold directly to
 15 the government, or to others at the direction of the government.” *See Bailey v. Monsanto*
 16 *Co.*, 176 F. Supp. 3d 853, 870 (on appeal); *see also Kelly v. Monsanto Co.*, No. 4:15 CV
 17 1825 JMB, 2016 WL 3543050, at *9 (E.D. Mo. June 29, 2016) (on appeal) (“Like the *Bailey*
 18 court, this Court concludes that . . . Defendants have met the ‘acting under’ requirement for
 19 federal officer removal only as to the PCBs that Old Monsanto sold directly to the
 20 government, or to others at the direction of the government.”). The State fails to explain why
 21 its own authorities should not control the “acting under” analysis to establish federal officer
 22 removal here.¹

23
 24 ¹ After finding the “acting under” requirement was met, the *Bailey* and *Kelly* courts
 25 nevertheless remanded on the ground that the plaintiffs’ claims lacked a sufficient nexus to
 26 PCBs Old Monsanto manufactured while acting under federal officers. For reasons
 Defendants address in Section II(A)(2), *infra*, Defendants satisfy the nexus requirement here
 and *Bailey* and *Kelly* are easily distinguishable on that point.

Defendants Sold PCBs Directly to the Federal Government

Defendants' notice of removal proffered samples of invoices—a quintessential contract for sale—for direct PCB sales to the Army, Navy, Air Force, Department of Agriculture, Government Printing Office, Council on National Defense, Office of Production Management, Department of Commerce, National Aeronautics and Space Administration (“NASA”), and the Atomic Energy Commission (“USAEC”). See Notice of Removal, Dkt. 1, Ex. 22.

While those exhibits were representative rather than exhaustive, see Notice of Removal, ¶ 12, Defendants have additional exemplar evidence of direct sales to multiple branches of the Armed Forces and military contractors within the State of Washington. Sales records from 1959 to 1971 show that Old Monsanto sold PCB-containing Aroclor Pyranol GE 1467, Aroclor Pyranol 1470, Transformer Inerteen PPO, Transformer Pyranol A13B3B, and Pydraul F-9 to the “US Navy Bremerton Wash,” “Boeing Airplane Co Seattle,” “US Naval Air St Seattle,” “US Navy Bremerton Wash,” “Naval Air Sta[tion] Oak Harbor,” “ITT Fed Support Richland WA,” “Navy Supply Seattle,” and “General Services Adm[inistration] Richland WA.” Ex. 1 to the Declaration of Robert Kaley (“Kaley Decl.”). These are extensive, direct sales that implicate water bodies the State alleges are contaminated with PCBs, and more than satisfy the “acting under” requirement for removal.

The Federal Officer Removal Statute Applies to Subcontractors

In addition to those direct sales and contracts, however, Defendants also are entitled to the benefits of the federal officer removal statute for conduct performed as a subcontractor, which includes an extensive history of PCB sales to military contractors who, like Old Monsanto, were helping the government in national defense and in conducting wars. Courts have repeatedly held that federal subcontractors can act under the color of federal office and may invoke the federal officer removal statute just like direct federal contractors.²

² See, e.g., *Humphries v. Elliot Co.*, 760 F.3d 414 (5th Cir. 2014) (defense subcontractor did

Against the weight of authority, the State cites *Morgan v. Great Southern Dredging, Inc.*, No. 11-2461, 2012 WL 4564688, at *1 (E.D. La. Sept. 30, 2012) to argue that subcontractors cannot remove under the federal officer removal statute. But as noted by a subsequent decision of the Eastern District of Louisiana, *Morgan* relied in error on *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387 (5th Cir. 1998), in support of that proposition. See *Humphries v. OneBeacon Am. Ins. Co.*, No. 13-5426, 2014 LEXIS 133465 (E.D. La. Sept. 23, 2014) (subcontractor acted under color of federal office and was entitled to remove case to federal court).³ In the absence of binding authority from the Ninth Circuit holding that subcontractors are not entitled to invoke federal officer removal, the Court should follow the majority rule and find that federal officer removal applies to subcontractors.

Defendants Manufactured and Supplied PCBs at the Direction of Federal Officers

The State also claims that Defendants' Notice of Removal failed to demonstrate that PCBs were manufactured under "direction" from any federal officer. See Motion at 6:19-20. The State's claim is demonstrably false. Old Monsanto manufactured and sold PCBs pursuant to orders from federal officers and military contractors (including Washington-based Boeing Company) over many decades. PCBs and their production were deemed "necessary to the national defense," and PCBs were provided to the government and its

not waive right to invoke federal officer removal statute after primary contractor dismissed); *Badilla v. Nat'l Air Cargo, Inc.*, No. 12-CV-1066-A, 2014 WL 6390324, at *2, 7 (W.D.N.Y. Nov. 17, 2014) (defendant acted under color of federal office, even though it "did not have a contract directly with the United States," but instead "was providing services . . . pursuant to a subcontract . . ."); *Campbell v. Brook Trout Coal, LLC*, No. 2:07-0651, 2008 WL 4415078, at *1 (S.D. W. Va. Sept. 25, 2008) (subcontractor acted under color of federal office).

³ The State's only other citation on this point is to *Ohio v. Sherwin-Williams Co.*, No. 2:08-cv-00079, 2008 WL 4279579 (S.D. Ohio Sept. 17, 2008), which is also misplaced. There, the court concluded the defendant did not "establish separately that [it] assisted or helped the federal government" as required. *Id.* Here, Defendants provided ample evidence that Old Monsanto directly assisted the government by expanding its plant to produce more PCBs, and by continuing to manufacture PCBs for the government under threat of criminal sanctions during wartime for applications that it had voluntarily ceased due to environmental concerns. Notice of Removal, Dkt. 1, ¶¶ 9, 17, Exs. 6-12.

Washington-based contractors and military installations to help carry out multiple wars. Kaley Decl., Ex. 1; Notice of Removal, Ex. 7 at 1376. For example:

- On November 11, 1972, a federal officer from the Department of Commerce wrote to Monsanto and stated: “You are hereby directed to accept Emerson and Cuming, Inc. purchase order” for “Aroclor 1242,” and that “[t]his action is taken pursuant to Section 101 of the Defense Production Act of 1950.” *See* Notice of Removal, Dkt. 1, Ex. 16 (emphasis added). Old Monsanto objected due to environmental concerns, but complied with the federal government’s directive. Notice of Removal, Ex. 17.⁴
- April 25, 1973 correspondence from Raytheon to Monsanto states that Raytheon departed from its normal course of business “only to obtain your agreement to promptly ship Aroclor 1242 and because the government has directed us to proceed to manufacture missiles but has refused to authorize Raytheon to qualify a new potting material which would avoid use of Aroclor 1242,” and that “Monsanto in all of our dealings has expressed a strong preference not to sell this product to us and is proceeding with the sale only at the direction of the government[.]” Notice of Removal, Ex. 4. (emphasis added).

Moreover, as set forth in Defendants’ Notice of Removal, when produced for the military, PCBs were subject to specifications dictated by and approved for particular uses by the federal government.⁵

In dismissing this evidence, the State urges the Court to apply the type of “narrow, grudging interpretation” that the Supreme Court has expressly instructed courts to avoid when interpreting the federal officer removal statute. *Jefferson Cnty. v. Acker*, 527 U.S. 423,

⁴ Monsanto stated in response: “As you are aware, because of the increasing environmental concerns expressed about products containing polychlorinated biphenyls (PCBs), Monsanto Company no longer sells Aroclor 1242 for the uses which we understand Emerson and Cuming, Inc. intend for the Aroclor 1242 we have been directed to deliver. This discontinuation of sales for this type of application is part of a policy voluntarily established by Monsanto and which has had the approval of various branches of the United States Government, including the U.S. Department of Commerce.” Notice of Removal, Ex. 17.

⁵ *See, e.g.*, Notice of Removal, Dkt. 1, Ex. 2 (government specification approving use of Aroclor 1254 in heat-resistant paint); Ex. 3 (invoice for shipment of Therminol FR-1 to Loring Air Force Base, “Certified for National Defense under DMS Reg DOC9e”); Ex. 4 (government-specified use of Aroclor 1242 in potting material for missiles); Ex. 5 (invoices specifying purchase of Pydraul #150 for use as lubricant, Inerteen for use in transformers, and Pyranol for use in transformers).

1 431 (1999); *Watson*, 551 U.S. at 147 (“the statute must be liberally construed”).⁶

2 The State also dismisses the valuable role private firms play when responding to
3 commands from federal officers to assist in the national defense during times of war, but this
4 is contrary to the holdings of the Supreme Court. “[T]he private contractor in such cases is
5 helping the government to produce an item that it needs.” *See Watson*, 551 U.S. at 153.
6 Indeed, areas of “‘uniquely federal’ interest” include “civil liabilities” arising from “federal
7 procurement contracts.” *Boyle v. United Techs. Corp.*, 487 U.S. 500, 505–06. Had Old
8 Monsanto failed to comply with directives issued under the Defense Production Act, it would
9 have been subjected to criminal sanctions by statute. 50 U.S.C. § 4513. Answering the
10 government’s urgent call should not now be held against Old Monsanto. This exemplifies
11 why a federal forum is necessary to protect uniquely federal interests from prosecution by the
12 State in its own sovereign tribunal. *Arizona v. Manypenny*, 451 U.S. 232, 242 (1981)
13 (removal permits trial to occur free from “local interests or prejudice”).

14 *The State Relies on Abrogated and Inapposite Authorities*

15 1. ***Ryan v. Dow Chemical***—The State places heavy emphasis on a now-
16 disapproved opinion, *Ryan v. Dow Chemical Co.*, 781 F. Supp. 934 (E.D.N.Y. 1992). *See*
17 Motion at 11:6–18. In *Ryan*, Judge Weinstein granted remand after finding that Dow
18 Chemical was not acting under color of federal office when supplying the government with
19 Agent Orange during the Vietnam War. *Ryan*, at 950. However, the State fails to note that,

20
21 ⁶ The State attempts to analogize this case to *Watson*, where the Supreme Court held that
22 Phillip Morris did not satisfy the “acting under” requirement when it complied with
23 government regulations for testing cigarettes. *Id.* at 157. But Defendants do not contend that
24 removal is proper simply because PCBs were highly regulated. Rather, removal is proper
25 because Old Monsanto had a special relationship with the government and “fulfilled the
26 terms of a contractual agreement by providing the government with a product that it used to
help conduct a war.” *Id.* at 153–54; *see* Notice of Removal, Exs. 3–5 & 22 (contracts for
sale); Kaley Decl., Ex. 1 (sales to the military in Washington). Conducting a war is a “basic
governmental task,” and Old Monsanto provided PCBs to help carry out multiple wars—“a
job that, in the absence of a contract with a private firm, the Government itself would have
had to perform” due to the unique, militarily advantageous properties of PCBs. *Watson*, 511
U.S. at 154.

1 in 2004, when considering “virtually identical circumstances,” *Isaacson v. Dow Chem. Co.*,
 2 517 F.3d 129, 134-35 (2d Cir. 2008), Judge Weinstein denied remand, holding that “[t]he
 3 *Ryan* decision is no longer persuasive,” and “was ‘not legally capable of appellate review.’”
 4 *In re “Agent Orange” Prod. Liab. Litig.*, 304 F. Supp. 2d 442, 445 (E.D.N.Y. 2004) (citing
 5 *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 392 (5th Cir. 1998)).⁷

6 **2. District Court PCB Orders**—The State also relies on seven district court
 7 orders remanding cases removed by Monsanto which, for many reasons, are irrelevant to the
 8 facts presented here and do not merit the Court’s adoption.

9 *First*, although the State’s brief gives the impression that these decisions constitute a
 10 general rule, it fails to note that five of the orders came from a single district court—the
 11 Southern District of Illinois—with three decisions (*Mobley*, *Brown*, and *Clayton*) issued by
 12 one district judge on two consecutive days. More importantly, all five of the orders involved
 13 facts much different than here. To begin with, the five cases involved the *disposal* of PCBs,⁸
 14 while here, the State expressly frames its Complaint in the broadest terms around the pre-
 15 1979 *manufacture* of PCBs.⁹ This distinction is critical to federal officer removal, as the
 16 federal government expanded and directed Old Monsanto’s manufacture of PCBs. The
 17 State’s attempt to hold the original manufacturer’s successor liable for PCB manufacturing
 18

19 ⁷ As Judge Weinstein correctly found in 2004, the “acting under color of federal office”
 20 requirement “should not be frustrated by a ‘narrow’ construction. Courts interpret the rule
 broadly to achieve the protective purpose of the statute.” *Id.* at 447.

21 ⁸ See *Anderson v. Hackett*, 646 F. Supp. 2d 1041, 1054 (S.D. Ill. 2009) (“the Monsanto
 22 Defendants are not being sued for producing PCBs, but for mishandling PCBs”); *Custer v.*
 23 *Cerro Flow Prods., Inc.*, No. 09-514-DRH, 2009 WL 5033931, at *7 (S.D. Ill. Dec. 15,
 24 2009) (same); *Mobley v. Cerro Flow Prods., Inc.*, No. 09-697-GPM, 2010 WL 55906, at *1
 (S.D. Ill. Jan. 5, 2010) (Plaintiffs “seek damages . . . due to allegedly improper disposal of
 toxic chemicals”); *Brown v. Cerro Flow Prods., Inc.*, No. 09-582-GPM, 2010 WL 55905, at
 *1 (S.D. Ill. Jan. 4, 2010) (same); *Clayton v. Cerro Flow Prods., Inc.*, Civil No. 09-550-
 GPM, 2010 WL 55675, at *1 (S.D. Ill. Jan. 4, 2010) (same).

25 ⁹ See, e.g., Compl. ¶ 85 (“Monsanto manufactured . . . PCBs in a manner that created or
 26 participated in creating a public nuisance”); ¶ 129 (Defendants allegedly are negligent
 because “a reasonably careful company would not continue to manufacture PCBs . . .”);
 Notice of Removal, Exs. 4, 16-17.

1 thus falls directly within the federal officer removal doctrine, even if more limited claims
 2 confined to particular instances of PCB “disposal” might not. Moreover, in all five cases, the
 3 evidentiary record differed markedly from that here.¹⁰ Finally, all five of those cases were
 4 decided before 2011, when the federal officer removal statute was amended to add the words
 5 “or relating to” to allow removal under the statute by “any officer (or any person acting
 6 under that officer) of the United States or of any agency thereof, sued in an official capacity
 7 for or relating to any act under color of such office.” 28 U.S.C. § 1442(a)(1) (emphasis
 8 added). The addition of the words, “or relating to,” was “intended to broaden the universe of
 9 acts that enable Federal officers to remove to Federal court.” *In re Commonwealth’s Motion*,
 10 790 F.3d at 467.

11 *Second*, the other two district court cases cited, *Bailey* and *Kelly*, are both on appeal.
 12 There, the plaintiffs alleged that “the PCBs Monsanto manufactured for the government were
 13 only for use in ‘closed electrical settings,’” while their claims against Monsanto expressly
 14 exempted those closed applications and only “attack[ed] Monsanto’s supply of PCBs for use
 15 in non-closed applications[.]” *Bailey*, 176 F. Supp. 3d at 862. Based on this limitation, the
 16 *Bailey* and *Kelly* plaintiffs argued that their claims did not involve any PCBs manufactured
 17 and supplied at the federal government’s behest. The opposite is true here: the State’s claim
 18 is not limited, but rather concerns *any* PCBs present in Washington water bodies without
 19 regard to source. As a result, the State’s claims necessarily include any PCB contamination
 20 resulting from Old Monsanto’s provision of PCBs to Washington-based military installations
 21 and contractors prior to 1979, including for uses directed by the federal government. Indeed,
 22 Defendants have already shown that alleged PCB contamination from such closed

23 ¹⁰ The record did not contain contracts for direct sales to agencies of the federal government
 24 (Notice of Removal, Dkt. 1, Exs. 5 & 22), commandments from the Department of
 25 Commerce to ship PCBs pursuant to the Defense Production Act (Exs. 16–19), Necessity
 26 Certificates for expansions of facilities that were “100%” for “Defense Purposes” (Exs. 6–8,
 10 & 11), commendations the military bestowed on Monsanto for its assistance in carrying
 out World War II (Ex. 9), or the “Sales Summary” documents showing direct sales to the US
 Navy in the State of Washington (Kaley Decl., Ex. 1).

1 applications is at issue, because a transformer laden with PCB coolant “destined for Alaska
2 in conjunction with the construction of an Air Force Radar Station” “was dropped [by GSA]
3 while being loaded onto a commercial barge resulting in 265 gallons of [PCBs] being spilled
4 into the Duwamish waterway.” Notice of Removal, Ex. 12 at 180.

5 *Finally*, in *Bailey and Kelly*, the plaintiffs supported their motion to remand with
6 affirmative expert evidence that only a small percentage of PCB sales at issue were made to
7 the government. *Bailey*, 176 F. Supp. 3d at 863. Defendants contend that the proportion of
8 PCBs at issue that were sold to the government is irrelevant, since, as the State’s authorities
9 recognize, federal officer removal “authorizes removal of an entire case, even though only
10 one of its controversies might involve a federal officer or agency.” *Anderson v. Hackett*, 646
11 F. Supp. 2d 1041, 1051 (S.D. Ill. 2009) (citing *N.J. Dep’t of Env’tl. Prot. v. Gloucester Env’tl.*
12 *Mgmt. Servs., Inc.*, 719 F. Supp 325, 334 (D.N.J. 1989); 14C Wright, Miller, Cooper &
13 Steinman, Federal Practice & Procedure § 3727).¹¹ And, in any event, the State has offered
14 no such expert evidence here. Instead, the State relies on an unverified and unscientific
15 calculation of how many pounds of PCBs were sold to the government directly, and then it
16 compares that to an estimate for nationwide PCB sales from the plaintiffs’ expert in *Bailey*.

17 This estimate is not a substitute for the State’s lack of evidence. Among other things,
18 nationwide sales are irrelevant to the State’s Complaint, which purports to be confined to
19 Washington’s geographical borders. The State lacks data establishing what amount of PCBs
20 were sold at the retail level in the State of Washington. Even worse, in referring only to
21 “14,235 pounds of PCB-containing products” ostensibly ordered by the federal government,
22 the State conveniently omits the 600,000 pounds *per month* that the federal government
23 funded through Necessity Certificates during the Second World War, “100%” of which were
24 for “Defense Purposes.” See Notice of Removal, Ex. 10 at 1394, Ex. 11 at 1404.¹²

25 ¹¹ The Court has supplemental jurisdiction over claims related to PCB sales made to entities
26 other than the federal government and its military contractors. 28 U.S.C. § 1367.

¹² Without delving too deep into this speculative exercise, using the approximately four years

2. A Causal Nexus Exists Between Defendants' Conduct Under Color of Federal Office and the State's Claims

Defendants easily satisfy the “causal nexus” requirement for federal officer removal.¹³ Contrary to the State’s arguments, “[t]he hurdle erected by this requirement is quite low, as ‘[t]he statute does not require that the prosecution be for the very acts which the officer admits to have been done by him under federal authority.’” *Isaacson*, 517 F.3d at 137 (quoting *Maryland v. Soper (No. 1)*, 270 U.S. 9, 33 (1926)). While Defendants need only show that the State’s claims are “for or relating to” acts performed under color of federal office, a direct causal nexus is obvious here because Defendants have shown direct sales of PCBs manufactured under color of federal office into the State of Washington, and the release by third parties of those PCBs into water bodies at issue.

Thus, the State’s claims are “for” the very acts Old Monsanto performed under color of federal office. And they clearly “relate to” those acts due to the State’s sprawling theory of liability. The State contends that Old Monsanto breached state tort law duties by manufacturing PCBs for any and all uses through 1979. *See* Compl. ¶ 85 (“Monsanto manufactured . . . PCBs in a manner that created or participated in creating a public nuisance”); ¶ 129 (Defendants allegedly are negligent because “a reasonably careful company would not continue to manufacture PCBs . . .”). And that is what Old Monsanto did for the federal government and its officers—it manufactured and supplied PCBs to Washington-based military facilities where releases to water bodies at issue occurred. There

between July 1941 and the armistice of August 14, 1945, the State might have miscalculated dramatically. And that is from one facility in four of the 44 years at issue in the Complaint. Notably, in *Bailey* and *Kelly*, the defendants “did not challenge the one hundredth of one percent figure presented by Plaintiffs.” *Bailey*, 176 F. Supp. 3d at 863. Needless to say, while the State has not adduced any evidence to support an “infinitesimal” or “*de minimis*” argument (not to mention that no court in the country other than the *Bailey* and *Kelly* courts have accepted such an argument), Defendants dispute the State’s speculative calculations.

¹³ By acknowledging a causal nexus between Old Monsanto’s conduct under federal officers and the conduct alleged in the Complaint, Defendants do not admit a causal nexus exists between the conduct alleged in the Complaint and the State’s alleged harm.

1 is a nexus between the State's theory and Old Monsanto's conduct under color of federal
2 officer.

3 Moreover, because the State seeks recovery with regard to all PCBs in Washington's
4 waters, its claims necessarily embrace PCBs sold by Old Monsanto to the government.
5 Defendants have *direct* evidence to satisfy this element because, as discussed above, in 1974
6 a large government-owned transformer destined for an Air Force facility was dropped during
7 transport by the General Services Administration, resulting in a massive spill of 1,000 kg of
8 PCBs into the Duwamish River, one of the water bodies at issue. Notice of Removal, Ex. 12.

9 In addition, Naval Base Kitsap, in Bremerton, Washington, "serves as the host
10 command for the Navy's fleet throughout the Pacific Northwest," and operates on numerous
11 water bodies allegedly contaminated by PCBs, including Sinclair Inlet, Port Orchard, Elliot
12 Bay, and Commencement Bay.¹⁴ Defendants have adduced evidence of direct sales from
13 Old Monsanto to the Navy in Bremerton, Washington. *See* Kaley Decl., Ex. 1. To the extent
14 PCBs manufactured by Old Monsanto are alleged to impair these water bodies, it is
15 inconceivable that they do not arise from Old Monsanto's acts taken under color of federal
16 office. *See* Kaley Decl., Ex. 1 (sales records showing direct sales of PCB-containing
17 products to, *inter alia*, the "US Navy Dept Bremerton," home of Naval Base Kitsap,
18 "General Services Adm[inistration] Richland WA," which sits on the Columbia River, and
19 "Naval Air Sta[tion] Oak Harbor," which lies on the Strait of Juan de Fuca).

20 The causal connection stems from the State's own dubious allegations: its vast theory
21 of liability that purports to link every PCB molecule produced over 40 years to Old
22 Monsanto as the allegedly sole domestic manufacturer of PCBs means that PCBs supplied to

23 ¹⁴ See Commander, Navy Installations Command, "Naval Base Kitsap,"
24 http://www.cnic.navy.mil/regions/cnrnw/installations/navbase_kitsap.html (last visited
25 December 19, 2016) (noting that Naval Base Kitsap "encompasses more than 10,000 acres
26 supporting nearly 70 tenant commands," and its website includes U.S. Navy photo by Petty
Officer 2nd Class entitled, "USS Nimitz (CVN 68) transits Sinclair Inlet, Port Orchard,
Wash., as it returns to its homeport, Naval Base Kitsap (NBK) – Bremerton Dec. 15"); see
also Compl. ¶ 6(a).

1 the military at its Washington-based installations and contractors on the water bodies at issue
 2 creates a sufficient causal nexus. The State cannot explain how—assuming Old Monsanto
 3 was the sole PCB manufacturer as alleged in the Complaint—the PCBs used on U.S. Navy
 4 vessels that are docked, decommissioned, and disassembled in the very water bodies
 5 implicated in the Complaint do not create a causal nexus to the manufacturer providing PCBs
 6 under color of federal office. *See* Compl. ¶ 6. In short, the conduct Old Monsanto
 7 performed at the government’s direction—manufacturing PCBs for electrical and a variety of
 8 other military applications—has a causal relationship to the conduct complained of in the
 9 Complaint—contamination resulting from the very PCBs that the government compelled Old
 10 Monsanto to manufacture. *Id.*, Ex. 17.¹⁵ And Defendants have adduced evidence of direct
 11 sales to the Navy, and other federal agencies, and defense contractors within the State of
 12 Washington with operations on the water bodies at issue.

13 Recent Ninth Circuit precedent holds that the Court is to “credit the defendant’s
 14 theory of the case” in “assessing whether a causal nexus exists.” *Leite*, 749 F.3d at 1124.
 15 The State insists that Defendants must prove, a few months after being sued, that their theory
 16 of the case is correct. But, again, that is not the law. Removal is proper and a causal nexus
 17 may be found even though Defendants “may not be right—indeed, it may be that the Navy
 18 had nothing to do with [the challenged conduct]. But the question of ‘whether the challenged
 19 act was outside the scope of [Defendants’] official duties, or whether it was specifically
 20 directed by the federal government is one for federal—not state—courts to answer.’” *Id.*

21
 22 ¹⁵ Even though Old Monsanto was compelled to make sales for uses it had voluntarily
 23 ceased, *see* Notice of Removal, Exs. 4 & 17, the State is incorrect in claiming that
 24 compulsion is a necessary feature of the relationship between the private contractor and the
 25 government. As the Second Circuit has held: “We find no authority for the suggestion that a
 26 voluntary relationship [between the government and the removing defendant] somehow
 voids the application of the removal statute. To require the relationship to have been not
 only ‘special’ but coerced makes little sense in light of the statute’s purpose, and it is
 particularly strange when applied to natural persons who are acting under a federal officer—
 all of whom, we would trust, are doing so voluntarily.” *Isaacson*, 517 F.3d at 138.

(quoting *Isaacson*, 517 F.3d at 138; citing *Willingham*, 395 U.S. at 407).¹⁶

3. Defendants Assert Colorable Federal Defenses

“To be ‘colorable,’ the defense need not be clearly sustainable, as the purpose of the statute is to secure that the validity of the defense will be tried in federal court.” *Isaacson*, 517 F.3d at 139 (citing *Willingham*, 395 U.S. at 406–07). “At its core, the defense prong requires that the defendant raise a claim that is ‘defensive’ and ‘based in federal law.’” *Id.* at 138 (citing *Mesa v. California*, 489 U.S. 121, 129–30). Defendants have asserted at least three such defenses here.

The Government Contractor Defense

Defendants assert the government contractor defense, “which is a creature of federal common law,” and is both “‘defensive’ and ‘federal.’” *Isaacson*, 517 F.3d at 139 (quoting *Mesa*, 489 U.S. at 129–30 (internal citation omitted)). As the Ninth Circuit held recently, at the removal stage, Defendants do not “have to prove that [their] government contractor defense is in fact meritorious” because, “[a]s the Supreme Court has held, a defendant invoking § 1442(a)(1) ‘need not win his case before he can have it removed.’” *Leite*, 749 F.3d at 1124 (quoting *Willingham*, 395 U.S. at 407).

The government contractor defense applies when “(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.” *Boyle v. United Tech. Corp.*, 487

¹⁶ Evidence already adduced shows that Old Monsanto manufactured and supplied PCBs at the direction of federal officers when it would not otherwise have done so, satisfying the nexus requirement. As one of the State’s authorities establishes, “[i]n the early 1970s, the Monsanto Defendants phased out production of PCBs for all but enclosed electrical uses.” *Anderson*, 646 F. Supp. 2d at 1045. As described earlier, in 1972 and 1974 the Department of Commerce directed Old Monsanto to deliver PCBs to military contractors for non-closed purposes, despite the fact that, by then, Old Monsanto had voluntarily ceased manufacturing PCBs due to environmental concerns associated with non-closed PCB uses. Notice of Removal, Exs. 16 & 19.

1 U.S. 500, 512 (1988). The State's sole paragraph concerning this defense fails to show that
 2 the defense is not colorable as to any of these elements. *See* Motion, at 15:1–16.

3 *First*, PCBs that Old Monsanto manufactured for the federal government all had
 4 reasonably precise specifications for particular uses by the federal government. *See, e.g.*,
 5 Notice of Removal, Exs. 2–5 (government specifications and correspondence regarding
 6 government requiring use of PCBs to meet specifications). Importantly, to satisfy this
 7 element, it is not necessary for the product supplied to be specially designed by the military
 8 with no input from the manufacturer. Indeed, the Ninth Circuit has expressly rejected that
 9 very argument. *See McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 450 (9th Cir. 1983)
 10 (rejecting plaintiff's argument that the government contractor defense "is only available
 11 where the specifications in the contract leave no discretion to the supplier in the formulation
 12 of the product's design"). To the extent proving this defense at trial requires evidence of a
 13 back and forth dialog between the government and contractor, *see* Motion at 15:11–15, that
 14 showing is not necessary to establish for purposes of removal that the defense is colorable,
 15 which is satisfied by Defendants' preliminary showing here. *See Leite*, 749 F.3d at 1124
 16 (citing *Jefferson Cnty.*, 527 U.S. at 431).¹⁷

17 The State contends that a specification for heat-resistant paint that Old Monsanto
 18 provided leaves some discretion as to the composition; however, the specification expressly
 19 called for Aroclor 1242, a PCB-containing product. Motion at 8:20–22. Regardless, the
 20 government contractor defense still applies if the specifications leave "some discretion to the

21 ¹⁷ The State cites *Cabalce v. Thomas E. Blanchard & Assoc., Inc.*, 797 F.3d 720 (9th Cir.
 22 2015), in noting that the government contractor defense is available only to those who design
 23 and manufacture military equipment. Motion at 15:1–3. *Cabalce* is inapposite because
 24 there, the defendant was an independent contractor hired by the Treasury Department to store
 25 fireworks that had been seized by government. *Cabalce*, 797 F.3d at 723. Fireworks are not
 26 military equipment used to help conduct wars. By contrast, Old Monsanto manufactured
 PCBs for use in military equipment and PCBs were deemed "necessary to the national
 defense." Moreover, the defendant in *Cabalce* conceded that it was not a military contractor,
 but claimed it was "plausible that the [government contractor] defense may apply outside of
 the military context" even though "binding precedent has not reached a similar conclusion."
Id. at 731, n. 9. *Cabalce* is distinguishable and the State's reliance on it is misplaced.

1 supplier in the formulation of the product's design." *McKay*, 704 F.2d at 450. The State also
 2 ignores specifications identified in the U.S. Air Force Armstrong Laboratory's 1994 report
 3 entitled, *Risk Assessment of Polychlorinated Biphenyls (PCBs) On-Board Navy Ships*.
 4 Notice of Removal, Ex. 23. That report identifies several military specifications as
 5 "[s]ources of potential PCB contamination found on nuclear submarines [] (Puget Sound
 6 Naval Shipyard (PSNS), 1994)," including "Ensolute hull insulation (MIL-P-15280)," "Cork
 7 hull insulation (MIL-C-561/HH-C-561)," "Armaflex hull insulation (MIL-P-15280)," "Heat
 8 resistant and aluminum paste paint (TT-P-28, MIL-P-14276 or DOD-P-24555)," and "Wool
 9 felt ventilation gaskets (MIL-G-2024/MIL-STD-2148)."¹⁸ The State addresses none of
 10 these.

11 *Second*, the various PCBs manufactured by Old Monsanto and sold to the federal
 12 government or its contractors at its direction met all applicable product specifications and
 13 satisfied government-required inspections.¹⁹ As discussed in the Notice of Removal, Old
 14 Monsanto received commendations from the military and the Army-Navy "E" Award based,
 15 in part, on satisfaction of government performance standards. *See* Notice of Removal, ¶ 13,
 16 Ex. 9. The State has adduced no evidence that any PCBs Old Monsanto manufactured or
 17 supplied did not conform to specification.

18 *Third*, Old Monsanto was not aware of dangers related to PCBs that were not known
 19 to the government. "The third prong does not require contractors to warn the government of
 20

21 ¹⁸ Defendants have shown, based on the limited evidence available without the benefit of
 22 discovery, that the government approved reasonably precise specifications. *Leite*, 749 F.3d
 23 at 1124. And Defendants have the right to insist in a federal forum that it is not for the State
 24 "involves not merely engineering analysis but judgment as to the balancing of many
 technical, military, and even social considerations, including specifically the trade-off
 between greater safety and greater combat effectiveness." *Boyle*, 487 U.S. at 511.

25 ¹⁹ *See, e.g.*, Notice of Removal, Ex. 3 (sales invoice to Loring Air Force Base (April 16,
 26 1971), noting certification for national defense under DMS Reg L DOC9E, and contractor
 responsibility for performing inspections and tests required to substantiate that supplies and
 services provided meet military specifications).

1 dangers already known to the government.” *See In re “Agent Orange” Prod. Liab. Litig.*,
 2 304 F. Supp. 2d 404, 435 (E.D.N.Y. 2004). But, even so, based on evidence adduced at this
 3 early stage, Old Monsanto warned the government regarding PCB hazards. *See* Notice of
 4 Removal, Ex. 17 (Nov. 17, 1972 correspondence from Old Monsanto to U.S. Dept. of
 5 Commerce, warning of environmental concerns and explaining need for care in handling,
 6 possession, use, and disposal of PCBs).

7 The State claims without citation to any authorities that Defendants’ government
 8 contractor defense is not colorable because Defendants have not shown previous success on
 9 it. Motion at 14:22–26. The State badly misunderstands Defendants’ burden. To be
 10 colorable, Defendants need not show that they have before or will now prevail (*Willingham*,
 11 395 U.S. at 407), for the defense need not be meritorious (*Leite*, 749 F.3d at 1124), nor must
 12 Defendants show a likelihood of success on the merits (*In re “Agent Orange,”* 304 F. Supp.
 13 2d at 449). Also, this case is materially different from prior actions involving PCBs because
 14 of the State’s theories of liability. The State is suing for contamination at the home of the
 15 Navy’s Pacific Fleet, where ships laden with PCBs ordered by the military have been docked
 16 and decommissioned for decades.

17 The evidence establishes that Defendants have a colorable claim to satisfy each of the
 18 three prongs of the government contractor defense and, therefore, are entitled to a federal
 19 forum in which to present it. *See Boyle*, 487 U.S. at 512. And the federal forum is crucial
 20 because, as Judge Weinstein held, “government contractor cases are freighted with factual
 21 findings,” and the substantive rule established by *Boyle* “may be readily circumvented by
 22 state courts unsympathetic to the defendants. Central to ‘Congress’ concern [was] local
 23 hostility to federal authority.” *In re “Agent Orange Prod. Liab. Litig.*, 304 F. Supp. 2d at
 24 451 (citing *Mesa*, 489 U.S. at 140 (Brennan, J., concurring)).

25 Defense Production Act

26 The Defense Production Act provides that “[n]o person shall be held liable for

1 damages or penalties for any act or failure to act resulting directly or indirectly from
 2 compliance with a rule, regulation, or order issued pursuant to this chapter, notwithstanding
 3 that any such rule, regulation, or order shall thereafter be declared by judicial or other
 4 competent authority to be invalid.” 21 U.S.C. § 4557. Here, the State is suing Defendants
 5 for Old Monsanto’s manufacturing of PCBs, and Defendants have submitted indisputable
 6 evidence that PCBs were ordered by federal officers pursuant to the Defense Production Act.
 7 Notice of Removal, Exs. 16–19 (Department of Commerce officials ordering Old Monsanto
 8 to accept purchase orders “pursuant to Section 101 of the Defense Production Act of 1950”).
 9 Thus, Old Monsanto was issued and complied with directives from federal officers under
 10 threat of criminal prosecution pursuant to the Defense Production Act to manufacture and
 11 supply PCBs. The State’s suit seeks to hold Defendants liable as Old Monsanto’s successor
 12 for complying with the government’s mandates under the Defense Production Act, raising a
 13 colorable federal defense under 21 U.S.C. § 4557.

14 *Express and Implied Preemption*

15 Defendants have another colorable federal defense because the State’s claims are
 16 preempted by the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2617, which provides
 17 a comprehensive regulatory approach to PCBs and other chemicals. *See, e.g.*, 15 U.S.C.
 18 §§ 2601(c), 2605(a), 2605(c)(1)(D). For PCBs in particular, there was consensus that
 19 preexisting uses of PCBs were essential for the safety of the nation’s electrical grid to
 20 prevent fires and explosions. *See, e.g.*, 47 Fed. Reg. 37,342, 37,342 (Aug. 25, 1982) (“An
 21 immediate ban of [PCBs] would not only have disrupted electric service but would also have
 22 caused severe economic hardship for the public and United States industry”).

23 Federal courts considering whether Defendants’ express TSCA preemption defense is
 24 colorable have held that it is. *See, e.g., Custer*, 2009 WL 5033931 at *5 (“the Court finds
 25 Defendants have presented a colorable federal defense”); *Anderson*, 646 F. Supp. 2d at 1053
 26 (same). And, in prior cases, court have ruled in favor of defendants on the merits of this

1 defense, finding both common law and statutory claims related to PCBs to be preempted by
 2 TSCA.²⁰ The State spends only a single sentence on this issue in its Motion (15:18–21).
 3 The State concedes that TSCA preempts “statutes” (Motion at 15:20), but it fails to explain
 4 why its *statutory* causes of action for public nuisance (RCW 7.48), product liability causes of
 5 action (RCW 7.72), and statutory trespass claim (RCW 4.24.630) do not fit the bill. Those
 6 statutes at a minimum raise a colorable federal defense under TSCA preemption. And the
 7 State does not explain why the 1977 effective date of TSCA precludes preemption here,
 8 where the State alleges (whether erroneously or not) that Old Monsanto manufactured PCBs
 9 until 1979. Compl. ¶ 3.

10 Defendants also have a further colorable defense that the State’s claims are
 11 preempted by the federal Comprehensive Environmental Response, Compensation, and
 12 Liability Act of 1980 (CERCLA). The State seeks to recover “natural resource damages”—
 13 damages expressly available under CERCLA (but not under any causes of action asserted by
 14 the State) against appropriate parties. CERCLA empowers “natural resource trustees,” such
 15 as a state, under a comprehensive and reticulated scheme by which liable parties are
 16 identified and the specific restoration-focused damages are apportioned among them. Thus,
 17 to the extent the Complaint purports to rest on state law, the suit frustrates the objectives and
 18 purposes of CERCLA by seeking to evade and undermine the comprehensive, detailed
 19 statutory scheme that Congress created to determine and allocate responsibility for natural
 20 resource restoration costs among multiple parties. The CERCLA “savings” clause that the

21
 22 ²⁰ See, e.g., *Rollins Env. Svcs. v. St. James Parish*, 775 F.2d 627 (5th Cir. 1985) (TSCA
 23 preempted local ordinance that functionally prohibited disposal of PCBs); *Twitty v. North*
 24 *Carolina*, 527 F. Supp. 878 (E.D.N.C. 1981) (nuisance and violation of ordinance claims
 25 preempted by TSCA). *Warren County v. State of N.C.*, 528 F. Supp. 276 (D. N.C. 1981);
 26 *TCI, Inc. v. Town of Ghent*, 165 A.D.2d 307 (N.Y.A.D. 1991); *Enviro. Transp. Sys. Inc. v.*
ENSCO, Inc., 736 F. Supp. 384 (C.D. Ill. 1991). Circuit courts have found that alone is
 enough to find the defense is colorable. See *City of Cookeville, Tenn. v. Upper Cumberland*
Elec. Membership Corp., 484 F.3d 380, 391 (6th Cir. 2007) (“[W]here the federal
 defense . . . had previously found success in other circuits, one would be hard pressed to say
 that the defense was not colorable”).

1 State cites as its sole response to this argument does not mean that CERCLA has no
 2 preemptive effect; it is well-settled that, notwithstanding that clause, State laws and claims
 3 that frustrate CERCLA's purposes and statutory scheme are preempted.²¹

4 Defendants also assert that the State's claims are barred by principles of conflict
 5 preemption. Specifically, the State claims that Washington State laws imposed a
 6 contemporaneous duty on Old Monsanto prior to 1979 not to manufacture PCBs, but that
 7 conflicts with federal directives requiring the manufacture of PCBs under the Defense
 8 Production Act, federal government orders and purchases, and statutes permitting the
 9 continued use of PCBs, e.g., 15 U.S.C. § 2605(e)(2)(A). The Washington law that the State
 10 says imposed a duty to stop commercial manufacturing of PCBs, therefore, stands as an
 11 obstacle to the accomplishment of federal objectives, and the State's claims are barred by
 12 principles of conflict preemption.²²

13 **B. The State Pleads a Federal CERCLA Natural Resources Damages Claim**

14 The State's Complaint raises a federal question under 28 U.S.C. § 1331 because it
 15 alleges "Monsanto's PCBs have caused and will continue to cause direct injury to
 16 Washington's public natural resources," Compl. ¶8, and it seeks "[d]amages for injury to
 17 natural resources, including the economic impact to the State and residents." Prayer for
 18 Relief No. 2. This is on its face a claim that arises under CERCLA, notwithstanding the
 19 State's attempt to disguise that fact by excising any mention of the statute in its Complaint.

21 ²¹ See *Fireman's Fund Ins. Co. v. City of Lodi, California*, 302 F.3d 928, 943 (9th Cir. 2002)
 22 (CERCLA preemption will be found where "state law stands as 'an obstacle to the
 23 accomplishment and execution of [CERCLA's] full purposes and objectives'") (quoting
Calif. Fed. Sav. And Loan Ass'n v. Guerra, 479 U.S. 272, 281 (1987)).

24 ²² A state "requirement" may take the form of a common law suit for damages. *Cipollone v.*
 25 *Liggett Group, Inc.*, 505 U.S. 504, 521 (1992). See also *Freightliner Corp. v. Myrick*, 514
 26 U.S. 280, 287 (1995) (federal law is supreme and overrides state law where state law stands
 as an obstacle to the accomplishment of objectives of Congress); *FDA v. Brown & Williams Tobacco Corp.*, 529 U.S. 120 (2000) (where Congress gives express sanction to an activity, the states cannot declare that activity tortious).

1 The State devotes less than a page to this issue, and it misses the point. The question
 2 is not whether CERCLA includes a savings provision (it does). The question is whether,
 3 notwithstanding the titles that the State ascribes to its causes of action to avoid pleading a
 4 CERCLA claim, the Complaint raises a federal question because the State repeatedly seeks
 5 “natural resource damages”— a creature of federal law and CERCLA specifically.²³

6 Here, CERCLA is the federal regulatory scheme under which the State may pursue
 7 from appropriate parties “damages for injury to, destruction of, or loss of natural resources,
 8 including the reasonable costs of assessing such injury, destruction, or loss[.]” 42 U.S.C. §
 9 9607(a)(4)(C). CERCLA expressly provides for a claim that is made against appropriate
 10 parties by a “State act[ing] on behalf of the public as trustee of such natural resources [i.e.,
 11 natural resources within the State] to recover such damages.”²⁴ 42 U.S.C. § 9607(f)(1). That
 12 is what the State is doing here. The eight cities litigating in federal court do not assert a
 13 claim for natural resource damages because they are not empowered to seek natural resource
 14 damages like states are under CERCLA.

15 The State expressly seeks to recover natural resource damages as the trustee of the
 16 State’s natural resources more than 25 times in the Complaint, and none of the enumerated

17 ²³ As explained in the Notice of Removal, under the well-pleaded complaint rule, that the
 18 State denominates its claims in state law terms does not end the inquiry. The State ignores
 19 that “[t]he [federal question] doctrine captures the commonsense notion that a federal court
 20 ought to be able to hear claims recognized under state law that nonetheless turn on
 21 substantial questions of federal law, and thus justify resort to the experience, solicitude, and
 22 hope of uniformity that a federal forum offers on federal issues” *Grable & Sons Metal*
Prods., Inc. v. Darue Eng’g & Mfg., 545 U.S. 308, 312 (2005). And “the artful pleading
 23 doctrine creates an exception” to the well-pleaded complaint rule, and it “exists where a
 24 plaintiff articulates an inherently federal claim in state-law terms.” *Brennan v. Sw. Airlines*
Co., 134 F.3d 1405, 1409 (9th Cir. 1998), *amended sub nom. Brennan v. Sw. Airlines*, 140
 25 F.3d 849 (9th Cir. 1998).

26 ²⁴ The wisdom of CERCLA’s collective approach gathering all stakeholders is obvious here,
 where the State purports to be acting on behalf of the public to address contamination at the
 same sites (e.g., Duwamish River) where the City of Seattle has claimed it is suing
 Defendants for the benefit of the State. *See City of Seattle v. Monsanto Co., et al.*, Case No.
 2-16-cv-107-RSL, Dkt. 60 at 8:7–9 (“Seattle argues that its claims are not subject to the
 applicable limitations periods because Washington law exempts local governments . . . when
 they bring suit for the benefit of the state”).

1 state-law claims recognizes or authorizes such damages—therefore, a “natural resource
 2 claim” under CERCLA is an element (and a substantial, essential one) of plaintiff’s causes of
 3 action. *See* Compl. ¶¶ 3, 7, 8, 9, 10, 12, 14, 15, 16, 17, 18, 20, 31, 87, 90, 91, 97, 98, 99,
 4 107, 116, 117, 131, 139, 140, 141; 42 U.S.C. § 9607(a)(4)(C); 42 U.S.C. § 9607(f)(1); *Gully*,
 5 299 U.S. at 112.

6 Despite the State’s purposeful avoidance of the acronym “CERCLA,” the Complaint
 7 can be read as invoking CERCLA on its face because only CERCLA provides the basis for
 8 the natural resource damages recovery that the Complaint makes clear is the focal point of
 9 the lawsuit. Section 107(f)(1) of CERCLA expressly provides for the State to sue “on behalf
 10 of the public as trustee” for the “natural resources within the State” to “recover for . . .
 11 damages” to “such natural resources,” and the Complaint reads like a carbon copy of Section
 12 107(f)(1), except for the omission of quotation marks and appropriate citations to
 13 CERCLA.²⁵

14 By contrast, *none* of the State’s six enumerated state law claims for public nuisance,
 15 product liability (defective design and failure to warn), negligence, equitable indemnity, or
 16 trespass recognizes or authorizes recovery for “damages” to “natural resources.”²⁶ Because
 17 natural resources damages are absent from these purported state law causes of action and are
 18 instead an essential element of CERCLA, the Complaint raises a federal question under a
 19 statute subject to exclusive federal jurisdiction.

20 ²⁵ There are numerous examples of CERCLA actions which involve both PCBs and water
 21 bodies the State lists in the Complaint as being contaminated with PCBs, further evidencing
 22 that CERCLA should govern here. *See, e.g.,* Exs. 1–3 (CERCLA Complaints in *U.S. v.*
Boeing Co.; *U.S. v. Advance Ross Sub. Co.*; *Pakootas v. Teck Cominco Metals*).

23 ²⁶ *See* Wash. Rev. Code § 7.48.130 (public nuisance statute; no mention of natural resources
 24 damages); Wash. Rev. Code § 7.72.030 (product liability statute; no mention of natural
 25 resources damages); *Degel v. Majestic Mobile Manor, Inc.*, 914 P.2d 728, 731 (Wash. 1996)
 26 (citing elements of common law negligence; no mention of natural resources damages);
Basin Ass’n of Condo. Owners v. Supreme Nw., Inc., 285 P.3d 70, 81 (Wash. Ct. App. 2012)
 (discussing elements of equitable indemnity; no mention of natural resources damages);
 Wash. Rev. Code § 4.24.630(1) (statutory trespass statute; no mention of natural resources
 damages).

C. The Complaint Invokes Federal Enclave Jurisdiction

The Complaint alleges that over 120 specific water bodies and “others” throughout Washington are contaminated with PCBs manufactured exclusively by Old Monsanto. Compl. ¶ 6(a). Many of those water bodies, including several on or adjacent to federal enclaves, were contaminated as a result of activities on the enclaves. Thus, this Court has jurisdiction under 28 U.S.C. § 1331 and article I, section 8, clause 17 of the U.S. Constitution²⁷ because actions that arise on federal enclaves necessarily present questions of federal law.²⁸

The State attempts to downplay PCB contamination on or arising from operations at federal enclaves. Without citation to actual PCB levels, the State speculates that for water bodies at issue that lie both within and outside of enclaves, PCB contamination is more pronounced “outside” the enclaves’ federal jurisdiction.²⁹ The State’s convenient speculation—which is mere guesswork—should be disregarded. But even more important, even if accurate, the State fails to explain why, even if the alleged PCB contamination were “less pronounced” on federal enclaves would divest this Court of jurisdiction over contamination on those enclaves as pled in the State’s Complaint—and the Court has supplemental jurisdiction over claims arising outside of federal enclaves in any event. 28 U.S.C. § 1367.

Moreover, the State cannot reasonably dispute that the alleged PCB contamination in

²⁷ A federal enclave results when a state transfers its territory to the United States through cession or consent, thus granting the federal government exclusive jurisdiction. To be considered a federal enclave, the federal government must have purchased a territory “by the Consent of the Legislature of the State.” See U.S. Const. art. I, § 8, cl. 17.

²⁸ “Federal courts have federal question jurisdiction over tort claims that arise on ‘federal enclaves.’” *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1250 (9th Cir. 2006).

²⁹ See Motion, at 17–18 (“while the headwaters of the Cowlitz River lie within Mount Rainier National Park, the main Cowlitz River—and the entirety of the portion affected by Monsanto PCBs—extends for approximately 105 miles outside the park,” and “ten miles of the 45-mile Elwha River—again, the portion of the river most affected by PCBs—lie outside the boundaries of Olympic National Park.”).

the waters surrounding the Puget Sound Naval Shipyard ("PSNS"), a federal enclave in Bremerton, Washington (*Murray v. Joe Gerrick & Co.*, 291 U.S. 315, 316–17 (1934)), arose due to military activity on the federal enclave, again providing support for removal on the basis of federal enclave jurisdiction.

IV. Conclusion

Old Monsanto was acting under the color of federal officers and agencies in conducting the production activities prior to 1979 for which the State of Washington now seeks to hold its alleged successors liable. Defendants properly removed this case under 28 U.S.C. § 1442 and assert colorable federal defenses, which they are entitled to present in a federal forum. In addition, the Complaint seeks natural resource damages under CERCLA, and alleges contamination arising on federal enclaves, both of which raise federal questions, provide the Court jurisdiction under 28 U.S.C. § 1331, and permit removal under 28 U.S.C. § 1441. The motion to remand should be denied.

Dated this 6th day of March, 2017.

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on the 6th day of March, 2017, I arranged for service of the foregoing
OPPOSITION TO MOTION TO REMAND to the parties via the Court's CM/ECF system
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